A

KAMARIAH A RASHID

v.

TASA CREDIT SDN BHD & ANOR

B

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDDIN SHAH JCA
MOHD HISHAMUDIN YUNUS JCA
SYED AHMAD HELMY JCA
[CIVIL APPEAL NO: A-02-160-2009]

C

14 JULY 2011

LAND LAW: *Charge - Creation of - Charge created in favour of bank on Malay Reserve land - Whether null and void - National Land Code, s. 340(2)(b), Fifth Schedule, para. 3(1)*

D

LAND LAW: *Transfer - Malay Reserve land - Whether null and void - National Land Code, s. 340(2)(b), Fifth Schedule, para. 3(1)*

CIVIL PROCEDURE: *Appeal - Decision of trial judge - Trial judge dismissing appellant's claim to declare charge and transfer of Malay*

E

Reserve land null and void - Whether trial judge lacked judicial appreciation on totality of evidence adduced - Whether appellate interference warranted

LIMITATION: *Fraud - Discovery of fraud - Malay Reserve land - Fraudulent charge and transfer - Discovery of fraud with reasonable*

F

diligence - Whether within six-year limitation period - Limitation Act 1953, s. 29

In this appeal, the 2nd respondent bank claimed that the appellant

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and her husband had taken a loan from it to purchase a Malay Reserve land and that the said land was charged to it as security for the loan. The appellant denied the aforesaid and brought an action against the respondents in the High Court, *inter alia*, to declare null and void the said charge including the transfer of the

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said land from the 1st respondent developer to the appellant and her husband. The trial judge dismissed the appellant's claim which led to the appeal herein. As the 1st respondent developer had since been wound up, the appeal herein concerned only the appellant and the 2nd respondent. The appellant's claim was

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based on fraud, misrepresentation and/or forgery. She claimed that she and her husband did not purchase the said land and that they did not at any time obtain any loan from the 2nd respondent nor

did they create any charge in favour of the 2nd respondent. On the other hand, the 2nd respondent, amongst others, contended that the appellant's claim was time-barred pursuant to s. 29 of the Limitation Act 1953 as it was brought on 10 August 1998 which was more than six years after the appellant could, with reasonable diligence, have discovered the fraud.

Held (allowing appeal with RM30,000 costs)
Per Syed Ahmad Helmy JCA delivering the judgment of the court:

(1) There was a lack of judicial appreciation on the part of the trial judge on the totality of the evidence presented. It was well established that failure to consider important evidence or important surrounding circumstances would constitute an error of law warranting appellate interference. (para 6)

(2) The 2nd respondent's letter of offer dated 20 August 1984 approving the loan for the purchase of the property had specifically stated that the loan was to be under the joint names of the appellant and her husband and that the said land was to be given as security by way of a first charge. However, the said letter was addressed only to the appellant and the evidence showed that there was no acceptance of its terms by the husband as there was only one signature therein, purportedly that of the appellant. The charge document, although bearing the names of the appellant and her husband, had only the signature of the appellant and not her husband. Although the annexure to the charge had carried both their names with their purported signatures, the entire registration of the transfer and the charge on the charge annexure was void *ab initio* as it was in contravention of s. 340(2)(b) of the National Land Code. The said annexure was fraught with forgery in respect of the signature of the appellant's husband as evidenced by his denial that the signature was his and his explanation as to why it was forgery. His evidence was not rebutted by the 2nd respondent with any credible evidence. (para 9)

(3) The subject property being Malay Reserve land had to be attested before a Collector of Land Revenue (para. 3(1) Fifth Schedule of the National Land Code). Though there purported to be one Abdul Rahim Desa, an Assistant Collector of Land Revenue for the Federal Territory, in the attestation column of both the charge and transfer documents,

he was not called as a witness to testify. The necessity of calling the said officer to testify was self-evident as the husband denied attending the Land Office. By reason thereof, both the transfer and charge instruments were void and fell within the feasibility provision of s. 340(2)(b) NLC. (para 9)

(4) The evidence of both the appellant and her husband supported by the evidence of DW1 (the bank officer of the 2nd respondent managing the appellant's account), DW3 (the bank officer attached to the Retail Loans Department of the 2nd respondent) and DW4 (a clerk of the 1st respondent) established that the loan application was applied for by the agents, servants and/or representatives of the developer. Hence, the appellant never had knowledge of the loan. That was further reinforced by the testimony of DW1 and DW3 that the appellant never applied for nor obtained the loan. (para 9)

(5) There appeared to be no notice or documents sent to the appellant by the 2nd respondent pertaining to the loan. The appellant, in essence, was unaware that she had any loan from the 2nd respondent. Her knowledge about the loan came about on 9 June 1998 when an MBf Mastercard officer informed her that her credit card was terminated as she had been declared a bankrupt through an advertisement appearing in the Star newspaper on 24 March 1998. She realised the fraud perpetrated against her upon enquiries made and upon perusing the documents handed to her in relation to the housing loan. Hence, she had knowledge of the fraud on 9 June 1998 and the commencement of the action by her on 10 August 1998 was well within the time frame of s. 29 of the Limitation Act 1953. (para 9)

Bahasa Malaysia *Translation Of Headnotes*

Dalam rayuan ini, responden kedua bank telah mendakwa bahawa perayu dan suaminya telah mengambil satu pinjaman daripadanya bagi pembelian satu tanah rizab Melayu dan telah menggadaikannya kepada responden kedua sebagai sekuriti bagi pinjaman tersebut. Perayu menafikannya dan telah membawa satu tindakan terhadap responden-responden di Mahkamah Tinggi, *inter alia*, untuk mengisytiharkan batal dan tak sah gadaian atas tanah tersebut termasuk pemindahan tanah tersebut oleh responden pertama yang

merupakan pemaju perumahan kepada responden kedua. Hakim bicara menolak tuntutan perayu yang telah membawa kepada rayuan semasa. Disebabkan responden kedua telah digulungkan, rayuan berkaitan perayu dan responden kedua sahaja. Tuntutan perayu berdasarkan fraud, salah nyataan dan/atau pemalsuan. Beliau mendakwa bahawa dia dan suaminya tidak membeli tanah tersebut dan tidak pernah mengambil apa-apa pinjaman daripada responden kedua. Mereka juga tidak pernah mewujudkan gadaian tersebut untuk manfaat responden kedua. Sebalikya, responden kedua, antara lain, mendakwa bahawa tuntutan perayu adalah di had masa berikutan s. 29 Akta Had Masa 1953 kerana ianya dibawa pada 10 Ogos 1998 iaitu lebih daripada enam tahun selepas perayu dengan usaha munasabah, sepatutnya menjumpai fraud tersebut.

Diputuskan (membenarkan rayuan dengan kos RM30,000) Oleh Syed Ahmad Helmy HMR menyampaikan penghakiman mahkamah:

(1) Terdapat kekurangan penilaian oleh kehakiman hakim bicara atas keseluruhan keterangan yang dikemukakan. Ianya telah diputuskan bahawa kegagalan untuk menimbangkan keterangan yang penting atau keadaan sekeliling yang penting akan membawa kepada satu undang-undang terkhilaf mengakibatkan campurtangan rayuan.

(2) Surat tawaran responden kedua bertarikh 20 Ogos 1984 meluluskan pinjaman tersebut bagi pembelian tanah tersebut telah menyatakan dengan khususnya bahawa pinjaman adalah atas nama bersama perayu dan suaminya dan bahawa tanah tersebut telah diberikan sebagai sekuriti melalui gadaian pertama. Tetapi surat tersebut hanya merujuk kepada perayu dan keterangan menunjukkan bahawa tiada penerimaan terma-termanya oleh suami perayu disebabkan terdapatnya satu tandatangan sahaja, iaitu tandatangan perayu. Dokumen gadaian juga, meskipun mengandungi nama-nama perayu dan suaminya, hanya mengandungi tandatangan perayu dan bukan suaminya. Walaupun lampiran kepada gadaian mengandungi kedua-dua nama dan tandatangan mereka, pendaftaran keseluruhan pemindahan dan gadaian atas lampiran gadaian adalah tak sah disebabkan ianya melanggari s. 340(2)(b) Kanun Tanah Negara. Lampiran tersebut penuh dengan pemalsuan berkaitan tandatangan suami perayu yang diperkukuhkan dengan keterangan suami perayu menafikan ianya kepunyaannya

dan penjelasan suami perayu berkaitan pemalsuan tersebut. Keterangan tersebut tidak dipatahkan oleh responden kedua dengan apa-apa keterangan kredibel.

(3) Harta berkenaan tanah rizab Melayu mesti di akusaksikan di hadapan Pemungut Hasil Tanah (perenggan 3(1) Jadual Kelima Kanun Tanah Negara). Walaupun terdapatnya seorang Abdul Rahim Desa yang merupakan Penolong Pemungut Hasil Tanah Wilayah Persekutuan, dalam ruang pengakusaksian kedua-dua dokumen-dokumen gadaian dan pemindahan, beliau tidak dipanggil sebagai saksi untuk membuktikannya. Keperluan pegawai tersebut untuk membuktikannya ternyata disebabkan suami perayu telah menafikan pergi ke Pejabat Tanah. Disebabkannya, kedua-dua dokumen pemindahan dan gadaian tak sah dan jatuh dalam lingkungan peruntukan yang boleh disangkal di dalam s. 340(2)(b) Kanun Tanah Negara.

(4) Keterangan kedua perayu dan suaminya yang disokong oleh keterangan DW1 (pegawai bank responden kedua yang mengendalikan akaun perayu, DW3 (pegawai bank yang bekerja di Jabatan Pinjaman-Pinjaman Retail responden kedua) dan DW4 (kerani responden pertama) menunjukkan bahawa permohonan untuk pinjaman tersebut dibuat ejen-ejen, pekerja-pekerja dan/atau wakil-wakil pemaju. Maka, perayu tidak pernah mempunyai pengetahuan tentang pinjaman tersebut. Ianya diperkukuhkan oleh testimoni DW1 and DW3 bahawa perayu tidak pernah memohon atau mendapatkan pinjaman tersebut.

(5) Tiada notis atau dokumen-dokumen yang dihantar kepada perayu oleh responden kedua perihal pinjaman tersebut. Perayu, sebenarnya, tidak tahu yang beliau ada pinjaman dengan responden kedua. Pengetahuannya mengenai pinjaman tersebut bermula pada 9 Jun 1998 apabila seorang pegawai Mastercard MBF memaklumkannya bahawa kad kreditnya dibatalkan kerana beliau diisytiharkan seorang bankrap melalui satu iklan yang dikeluarkan dalam akhbar The Star pada 24 Mac 1998. Dia menyedari fraud terhadapnya selepas pertanyaan-pertanyaan yang dibuatnya dan selepas meneliti dokumen-dokumen yang diberikan kepadanya berkaitan pinjaman perumahan tersebut. Dengan itu, beliau hanya mengetahui fraud tersebut pada 9 Jun 1998 dan tindakan yang dimulakan olehnya pada 10 Ogos 1998 adalah dalam lingkungan masa s. 29 Akta Had Masa 1953.

Case(s) referred to:

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd (Bhagat Singh Surain Singh & Ors (Interveners) [1996] 4 CLJ 52 HC ***(refd)***
Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(refd)***
Mst Chameli Debi v. Purusattan Singh [1974] AIR Calcutta 316 ***(refd)***
Peco Arts Inc v. Hazlitt Gallery Ltd [1983] 1 WLR 1315 ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 29
National Land Code, s. 340(2)(b)

For the appellant - Vignesh Kumar Krishnasamy (Safia Ahmad Jahidi with him); M/s Balendran Chong
For the second respondent - Paul Kwong (Sonia Abraham with him) M/s Azman Davidson & Co

[Appeal from High Court, Taiping; Originating Summons No: 24-154-1998]

Reported by Usha Thiagarajah

JUDGMENT

Syed Ahmad Helmy JCA:

[1] The appellants' claim before the High Court, filed by way of an originating summons – and subsequently, by consent of the parties, converted to a writ action, was for the following reliefs:

(i) a declaration that the charge dated 20 October 1984 and the registration of the charge on 7 January 1985 *vide* Presentation No 409/85 Jilid No: 1830 Folio 49 (hereinafter called the "charge") is null and void;

(ii) a declaration that the transfer of the property held under H.S.(D) KK 735/82 PT 1433 Mukim Sayung, Daerah Kuala Kangsar (hereinafter called the "property") from the first respondent to the appellant and Supian bin Jasmani on 7 January 1985 and the registration of the transfer is null and void.

[2] The appellants' claim is based on fraud, misrepresentation and/or forgery. The appellant's position was that neither she nor her husband, Supian bin Jasmani, purchased the property and that she and her husband at no time obtained any loan from the respondent bank nor created any charge in favour of the respondent.

[3] The learned trial judge, after a full trial, dismissed the appellant's claim.

[4] The appeal herein only concerns the appellant and the respondent bank. The developer who was the 1st defendant in the court below has been wound-up.

[5] Evidence of the appellant's claim was adduced by her and her husband, Supian, whilst the defence of the respondent bank was by the evidence of four witnesses. The learned trial judge in evaluating the oral and documentary evidence adduced found that the appellant failed on a balance of probabilities to prove her claim and accordingly dismissed the same.

[6] At the conclusion of the appeal, upon a close scrutiny of the notes of evidence and contemporary documents in the record of appeal, and upon hearing and considering the submissions both written and oral of counsel of the respective parties, we are impelled to exercise our appellate jurisdiction to interfere with the decision of the learned trial judge. It is our considered view that there is a lack of judicial appreciation on the part of the learned trial judge of the totality of the evidence presented. It is well established that failure to consider important evidence or important surrounding circumstances would constitute an error of law warranting appellate interference – see *Mst Chameli Debi v. Purusattan Singh* [1974] AIR Calcutta 316.

[7] There is no dearth of authorities empowering appellate interference in instances where the decision of trial judges was arrived at without any or insufficient judicial evaluation and appreciation of the evidence adduced. Notable amongst them is the Court of Appeal decision of *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 where Gopal Sri Ram JCA (as he then was) lucidly phrased it as follows:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its decision. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think appropriate that we say what judicial appreciation of evidence involves.

A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness, test it against relevant criteria. Thus, he must take into account the presence or absence of any motive that a witness may have in giving his evidence. If there are contemporary documents, then he must test the oral evidence of a witness against these. He must also test the evidence of a particular witness against the probabilities of the case. A trier of fact who makes findings based purely upon the demeanour of a witness without undertaking a critical analysis of that witness' evidence runs the risk of having his findings corrected on appeal. It does not matter whether the issue for decision is one that arises in a civil or criminal case: the approach to judicial appreciation of evidence is the same. There are a number of important and leading cases in which the point has been considered.

In our considered judgment, the authorities discussed thus far, apart from explaining what judicial appreciation of evidence involve, illustrate a principle central to appellate interference. The principle is that a decision arrived at by a trial court without judicial appreciation of the evidence may be set aside on appeal. There are several authorities that establish the principle.

[8] Based on the evidence as presented before the learned trial judge, the following are the salient facts of the case:

1. The property in question is a Malay reserve land.

2. The original registered owners as evident by the title deed in exh. P4 were Mohd. Tahir bin Haji Nasir and Jamaluddin bin Mohd. Dom. They charged the property to the respondent bank on 15 October 1982.

3. The title to the property has all along been in the possession of the respondent bank.

4. The charge by Mohd. Tahir bin Haji Nasir and Jamaluddin bin Mohd. Dom was discharged and the property was on 7 January 1985 transferred and registered in the joint names of the appellant and her husband in equal 1/2 share and a charge were registered again in favour of the respondent bank.

5. The letter of offer dated 20 August 1984 from the respondent bank approving the loan for the purchase of the property (exh. D11) was addressed to the appellant.

6. The charge instrument (exh. P5) bears both the names of appellant and her husband; but bears the signature of only the appellant at the execution column.

7. The annexure to the charge (exh. P6) bears both the names of appellant and her husband and at the execution column there appears two signatures. The appellant acknowledges the lower signature as hers, whilst her husband disputes the top signature as his.

8. No sale and purchase agreement of the property duly executed by the appellant and her husband was produced as an exhibit in court.

9. The appellant did not at any time forward the loan documentation to the respondent bank. It was forwarded by the developer (1st respondent) to the respondent bank.

[9] In the light of the salient facts aforesaid and evaluating it against both the documents and oral evidence we are constrained to conclude that the learned trial judge ran afoul of the principle of judicial appreciation of evidence in respect of the following:

1. The terms of the letter of offer (exh. D11) specifically states that the loan is to be under the joint names of the appellant and her husband and that the property is to be given as security by way of a first party charge. The letter of offer is addressed only to the appellant and the evidence shows that there was no acceptance of the terms of the letter of offer by the husband as there is only one signature purportedly that of the appellant at the acceptance column.

2. The charge document in exh. P5, though bearing both the names of the appellant and her husband on the front page, nevertheless in the execution column the signature of the husband does not appear though the signature of the appellant appears. Then again there is the annexure to the charge (exh. P6) where both the names of the appellant and her husband and their purported signatures appear. On the charge annexure we find that the entire registration of the transfer and charge is void *ab initio* being in contravention of s. 340(2)(b) of the National Land Code. The annexure to the charge is fraught with forgery in respect of the signature of the appellant's

husband as evidenced by his denial that the signature was his and his explanation as to why it was a forgery. His evidence was never rebutted by the respondent bank with any credible evidence.

3. The subject property being Malay reserve land has to be attested before a Collector of Land Revenue (see para. 3(1) of the fifth schedule of the National Land Code 1965) Though there purported to be the name of one Abdul Rahim bin Desa, Penolong Pemungut Hasil Tanah Wilayah Persekutuan, in the attestation column of both the charge and transfer documents, nevertheless, he was not called as a witness to testify. The necessity of calling the Penolong Pemungut Hasil Tanah to testify is self evident as the husband has denied attending the Land Office. By reason thereof both the transfer and charge instruments are void and fall within the feasibility provision of s. 340(2)(b) of the National Land Code (see *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd (Bhagat Singh Surain Singh & Ors (Interveners)* [1996] 4 CLJ 52; *United Malayan Banking Corporation v. Syarikat Perumahan Luas Sdn Bhd (No. 2)* [1988] 3 MLJ 352; *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269).

4. The evidence of both the appellant and her husband and supported by the evidence of DW1 the bank officer of the respondent bank managing the appellant's account, DW3 another bank officer attached to the Retail Loans Department of the respondent bank and DW4 a clerk of the 1st respondent establishes that the loan application was applied for by the agents, servants and/or representatives of the developer and hence the appellant never had knowledge of the loan. This is further reinforced by the testimony of DW1 at pp. 130-135 of the appeal record and of DW3 at pp. 137-141 of the appeal record that the appellant never applied for nor obtained the loan.

5. On the issue of limitation, it is the respondent bank's contention that the appellants claim is time barred pursuant to s. 29 of the Limitation Act 1953 as it was brought on 10 August 1998 which is more than six years after the appellant "could with reasonable diligence have discovered the fraud." It is the respondent bank's submission that the appellant should have taken such steps that an ordinary

prudent person would have taken under the circumstances – see *Peco Arts Inc v. Hazlitt Gallery Ltd* [1983] 1 WLR 1315. It is argued by the respondent that and in the context herein the fraud could have been discovered on 20 October 1984 when the appellant herself executed the charge or at the latest 11 January 1985 when the respondent bank wrote to inform her about the disbursement of the loan. Hence as the last day for commencement of the action was 10 January 1992 it follows that the action herein being filed on 10 August 1998 was clearly statute barred.

From the appeal record there does not appear to be any notice or documents sent to the appellant by the respondent bank pertaining to the loan. In essence the appellant was unaware that she had any loan from the respondent bank. Her knowledge about the loan came about on 9 June 1998 when an MBF Mastercard officer informed her that her credit card has been terminated as she had been declared a bankrupt through an advertisement appearing in the Star newspaper on 24 March 1998. She realised the fraud perpetrated against her upon enquiries made with an officer of the respondent bank and upon perusing the documents handed to her in relation to the housing loan. Hence in the context of the factual matrix herein the point of time when she had knowledge of the fraud was 9 June 1998 and the commencement of the action by her on 10 August 1998 was well within the time frame of s. 29 of the Limitation Act 1953.

[10] By reason aforesaid, the appeal is accordingly allowed with costs, the decision of the learned trial judge is set aside and an order in term is made in respect or prayers (c), (g) and (j) of the amended originating summons together with the consequential order directing the Registrar of Titles of Perak to effect and register the cancellation of the registration of the transfer of the property to the appellant and Supar bin Jasmani on the Register of Title. Fixed costs of RM30,000 for this appeal and the court below be paid by the respondent to the appellant.